Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

(3)

No. 96-345

In The

Supreme Court of the United States

October Term, 1995

LEONARD GREENE and JOYCE GREENE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. SPORN
GERALD & LAWRENCE BLUMBERG
521 Fifth Avenue
New York, NY 10175
(212) 697-5550

SHELDON H. ELSEN
Counsel of Record
MELISSA A. COHEN
ORANS, ELSEN & LUPERT LLP
One Rockefeller Plaza
New York, NY 10020
(212) 586-2211

Attorneys for Petitioners

9958
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

4 pp

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner submits this short reply brief because the Government's brief in opposition would eliminate the conflict between the Circuits by assuming it away.

In the conflicting Ninth Circuit case, *Kamilche Co. v. United States*, 53 F.3d 1059 (1995), *modified*, 75 F.3d 1391 (9th Cir. 1996), resolution of the issue involved in earlier litigation, that a taxpayer owned certain property, was held to preclude further litigation affecting the question of ownership even though the second case involved entirely different rules, drawn from the doctrine of adverse possession, that were available in the first case but not invoked.

The Second Circuit's holding in this case is to the contrary. Here the earlier litigation determined that capital gain need not be recognized when the long-term portions of appreciated commodity futures are donated to a recognized charity. Yet the Second Circuit permitted further litigation that affected the question of such capital gain recognition, and indeed changed the result, in a second case where different rules were invoked. Those different rules, drawn from I.R.C. § 1256, had been available in the first case but were not argued (or were not argued sufficiently to be considered).

The Second Circuit permitted the second litigation about recognition of gain, even though the court found that "the evidence involved in the two cases [was] essentially the same", because the "new argument involves application of entirely different rules than those involved in the initial litigation." *Greene v. United States*, 79 F.3d 1348, 1353 (2d Cir. 1996) ("Greene II"). Thus the two Circuits applied different, indeed opposite standards, and reached different conclusions about issue preclusion.

The Government argues here that the first *Greene* case only decided "that petitioners had made completed transfers of property." (Brief in Opposition, p. 12). This is incorrect. What *Greene I* decided was that capital gain did not have to be recognized when the long-term portions of appreciated commodity futures were donated to the charity. If one were to apply the Government's *Greene II* reading to *Kamilche,* it would result in issue preclusion only of subsidiary findings and holdings, but not of the question of ownership, and permit litigation of adverse possession in the second case. The Ninth Circuit did not so hold and thus differed from the Second Circuit, which took a narrow definition of the issue which had been determined, as the Government would. What is important here, however, is not who was right in defining the scope of the issue which had been determined — a difficult task — but rather recognition of the conflict between the Circuits.

The same problem appears in the Government's treatment of the conflicting District of Columbia decision, *Yamaha Corp. v. United States,* 961 F.2d 245 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 1078 (1993). The brief in opposition reads that case as holding "[a]lthough the plaintiff attempted to advance new arguments . . . [it] was precluded from contesting the same regulations on the basis of arguments that were advanced by to it [sic] in the prior proceedings." (Brief in Opposition, p. 11). An apparent typo blurs the brief's meaning, but our best guess is that the Government is doing the same thing for *Yamaha* as for *Kamilche,* making semantic distinctions that obscure the real conflict in legal doctrine between the Circuits.

The question for this Court is whether to determine issue preclusion by applying the "different rules" analysis of the Second Circuit or the "different rules" analysis of the Ninth and D.C. Circuits. The Solicitor General commendably makes no effort to deny the great importance of resolving such a

question if this Court finds that the Circuits are in conflict. We submit that the conflict is real and we respectfully request this Court resolve it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHELDON H. ELSEN
Counsel of Record
MELISSA A. COHEN
ORANS, ELSEN &
LUPERT LLP
One Rockefeller Plaza
New York, NY 10020
(212) 586-2211

RICHARD A. SPORN
GERALD & LAWRENCE
BLUMBERG
521 Fifth Avenue
New York, NY 10175
(212) 697-5550

Attorneys for Petitioners